

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CA NO. 05-10696RGS

ARTHUR AUSTIN,
Plaintiff,

v.

**ESSEX COUNTY CORRECTIONAL FACILITY,
FRANK COUSINS, MICHAEL MARKS, ELAINE
BUSHWAY, BRIAN LAVOIE, THOMAS
FRANCESCONI, JASON COPP, ROBERT
KOSTAN AND JOSEPH GOLDSTEIN,
Defendants.**

**DEFENDANT ESSEX COUNTY CORRECTIONAL FACILITY'S
MOTION TO DISMISS**

I. STATEMENT OF THE CASE

This is an action brought by the plaintiff for events transpiring on March 30, 2003 at the Essex County Correctional Facility in Middleton, MA. Specifically, the plaintiff alleges that on that day his civil rights were violated pursuant to both the federal and state constitutions (Count I, Count II and Count III); and that the defendants committed state torts (Count IV and Count V). Finally, the defendants ECCF, Marks and Cousins are liable to the plaintiff under the doctrine of *respondeat superior*. (Count VI).

The defendant moves to dismiss pursuant to F. R. Civ. P. 12(b).

II. STATEMENT OF THE FACTS

On two separate occasions on or about Sunday, March 30, 2003, defendants Bushway, Lavoie, Francesconi, Copp, Kostan and Goldstein had the plaintiff a mildly retarded African American, brought to the prison infirmary, put in a medical johnny, made the plaintiff knee on the floor with his arms handcuffed behind him and forced to eat cake, pushing his face in the

cake and flicking his ears. (Complaint, paragraph 5).

III. ARGUMENT

The Essex County Correctional Facility Is Not A Recognized Legal Entity.

ECCF has been named as a defendant in this action. However, ECCF is not a separate, legally distinct entity but a department within the Commonwealth of Massachusetts. Accordingly, any and all claims brought against the ECCF are more appropriately directed against the Commonwealth of Massachusetts. See Stratton v. City of Boston, 731 F. Supp. 42, 46 (D. Mass. 1989).

IV. CONCLUSION

Accordingly, ECCF moves this honorable court to dismiss this case.

Defendants, Cousins and Marks
By their Attorney,

/s/ Stephen C. Pfaff
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CERTIFICATE OF SERVICE

I, Stephen C. Pfaff, hereby certify that on the 25th day of May, 2005, I served the following electronic filing and/or by causing a copy to be mailed, postage prepaid, directed to **Patrick W. Morgan, Esquire**, RIFKIN LAW OFFICES, 60 Federal Street, Salem, MA 01970 and **Howard B. Lenow, Esquire**, Lenow & McCarthy, 13 Pelham Island Road, Wayland, MA 01778.

/s/ Stephen C. Pfaff
Stephen C. Pfaff